

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID CONTRERAS, as Trustee, etc.,

Plaintiff and Appellant,

v.

ANDREW T. COOLEDGE,

Defendant and Respondent.

G056167

(Super. Ct. No. 30-2017-00941294)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Appeal dismissed.

Cabanday Law Group and Orlando F. Cabanday for Plaintiff and Appellant.

California Anti-SLAPP Project and Mark Goldowitz for Defendant and Respondent.

*

*

*

The trial court granted the respondent's anti-SLAPP motion to strike and entered judgment for the respondent. This appeal followed, and the respondent filed a motion to dismiss. Because the appellant's notice of appeal was untimely and did not correctly identify the appealable order, we grant the motion to dismiss and do not reach the merits of his appeal.

I.

FACTS

Appellant David Contreras filed a complaint against his brother and his brother's attorney, respondent Andrew T. Cooledge. The only cause of action asserted against Cooledge was a claim for slander of title.

Cooledge filed an anti-SLAPP motion arguing Contreras's slander of title claim arose out of protected activity. The trial court granted the anti-SLAPP motion after oral argument on December 4, 2017, and it entered a two-page order to that effect on December 15.

In February 2018, Cooledge electronically filed and served a notice of entry of order granting the anti-SLAPP motion. The parties agree Cooledge electronically filed the notice of entry on February 5, but they dispute the precise date of electronic service. The date of service is relevant because, as discussed below, it triggered the deadline for Contreras's appeal.

The dispute about the date of service arises from an apparent typographical error on the proof of service attached to Cooledge's notice of entry of order. According to the proof of service, Cooledge's counsel electronically served the notice of entry on February 15 by directing OneLegal¹ to effectuate electronic service on Contreras's

¹ Under rule 352 of the Orange County Superior Court, Local Rules, parties must effectuate the electronic filing of documents by using a court-approved electronic service provider. OneLegal is a court-approved provider.

counsel. Cooledge's counsel subsequently explained in a signed declaration that the February 15 date on the proof of service was a typographical error, and OneLegal in fact effectuated service on February 5, 2018. To support this correction, Cooledge's counsel provided OneLegal's order confirmation page, which shows OneLegal electronically filed and served the notice of entry on February 5, 2018 at 3:24 p.m.²

Contreras disputes the February 5 service date, citing Cooledge's proof of service as definitive proof of the February 15 service date. Contreras's counsel's declaration is oddly silent, however, about when he actually received Cooledge's notice of entry of order. Further, Contreras's counsel has not provided an internally date-stamped copy of what was served on him, nor does he contend OneLegal electronically served him at an incorrect e-mail address.

On February 6, 2018, the trial court entered a judgment of dismissal in Cooledge's favor, and on April 7, Cooledge filed and served a notice of entry of judgment of dismissal.

On April 9, 2018, Contreras filed a notice of appeal purporting to appeal from the "4/5/2018" [sic] "Dismissal after CCP Section 415.16 [sic] motoin [sic]." Cooledge filed a motion to dismiss the appeal.

II.

DISCUSSION

Contreras argues the trial court's analysis of Cooledge's anti-SLAPP motion was flawed and the judgment must be reversed. Cooledge asserts we lack

² The 3:24 p.m. time stamp is consistent with the trial court's date-stamped version of the notice of entry of order and the Register of Actions, which both show the notice of entry was electronically filed on February 5, 2018, at 3:24 p.m. A February 5 service date is also consistent with the date in counsel's signature block in the notice of entry of order.

jurisdiction to consider Contreras's appeal because his notice of appeal was untimely and failed to identify the appealable order. We agree with Cooledge.

A. *Requirements for Timely Appealing an Anti-SLAPP Order*

“‘Compliance with the requirements for filing a notice of appeal is mandatory and jurisdictional,’ and an appellate court therefore must dismiss an appeal that is untimely.” (*Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1107.) After the deadline to appeal expires, we have no power to entertain the appeal. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Thus, “‘an aggrieved party *must* file a *timely* appeal or forever lose the opportunity to obtain appellate review.’” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46; see *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 [“if an order is appealable, appeal must be taken or the right to appellate review is forfeited”].)

California Rules of Court, rule 8.104(a) specifies the deadline for filing a notice of appeal: the earlier of 60 days after service of the notice of entry of judgment or 180 days after the judgment. These deadlines also apply to appealable orders. (Cal. Rules of Court, rule 8.104(e).)

An order granting a special motion to strike under the anti-SLAPP statute is an appealable order. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13); *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247 (*Maughan*) [“[t]he order granting the anti-SLAPP motion therefore was final when made, and thus appealable”].) Thus, the deadline to file a notice of appeal of an order granting an anti-SLAPP motion is either 60 days after service of the notice of entry of order or 180 days after the order, whichever is earlier. (Cal. Rules of Court, rule 8.104(a), (e).)

Appellate review of an order granting an anti-SLAPP motion requires a timely appeal from the order, not from the subsequent judgment, and a party who fails to appeal from an order on an anti-SLAPP motion cannot later challenge the trial court's

ruling by appealing from the final judgment. (*Maughan, supra*, 143 Cal.App.4th at p. 1247 [because “the order on the anti-SLAPP motion is itself appealable, we are foreclosed from reviewing that order on appeal from the judgment”]; see also *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583 [“[o]nce a final, appealable order . . . has been entered, the time to appeal begins to run” and the time to appeal cannot “be restarted or extended by the filing of a subsequent judgment or appealable order making the same decision”].) As one court noted, “even highly regarded and experienced counsel can overlook that an order granting a motion to strike is immediately appealable.” (*Russell v. Foglio* (2008) 160 Cal.App.4th 653, 664-665 (conc. opn. of Rubin, J.) [discussing *Maughan* and inviting the Legislature to change the statute so that appellants do not fall into the “trap” of “los[ing] their right to appeal from the order granting the motion to strike while they await the final judgment”].)

B. *Application*

Before we can consider the merits of Contreras’s appeal, we must determine whether his notice of appeal was timely and based on an appealable order.

Contreras had to file his notice of appeal within 60 days of Cooledge’s service of his notice of entry of order granting the anti-SLAPP motion. (Cal. Rules of Court, rule 8.104(a), (e).) We therefore must determine when service was effectuated — a date the parties dispute.

The proof of service on the notice of entry states it was served on February 15, 2018, and in the absence of conflicting evidence, we would presume that date is correct. (Evid. Code, § 640 [“A writing is presumed to have been truly dated”].) Cooledge’s counsel overcame that presumption, however, by explaining in his declaration that the February 15 date on the proof of service was a typographical error and OneLegal in fact effectuated service on February 5. Importantly, his explanation is corroborated by OneLegal’s order confirmation page, which shows OneLegal

electronically filed and served the notice of entry on February 5, 2018, at 3:24 p.m. We therefore find Cooledge electronically served the notice of entry on February 5.

Contreras thus had to file his notice of appeal within 60 days of February 5, 2018 — that is, by April 6, 2018. He did not do so. Instead, he filed a notice of appeal on April 9, 2018.

His notice of appeal was not only late; it also failed to correctly identify the appealable order — the trial court’s December 15, 2017 order granting Cooledge’s anti-SLAPP motion under Code of Civil Procedure section 425.16. Instead, Contreras’s notice of appeal purported to appeal from the “4/5/2018” [*sic*] “Dismissal after CCP Section 415.16 [*sic*] motoin [*sic*].” Although we normally construe a notice of appeal liberally (Cal. Rules of Court, rule 8.100(a)(2)), here the notice of appeal makes no reference to the trial court’s December 15, 2017 appealable order. Instead, it refers to either the April 7, 2018 notice of entry of judgment of dismissal, or perhaps the February 6 judgment, neither of which is appealable.

The *Maughan* case is instructive. In February, the trial court filed an order granting the defendant’s anti-SLAPP motion, and in April, the court entered a judgment that restated the court’s earlier order and dismissed the complaint with prejudice. (*Maughan, supra*, 143 Cal.App.4th at pp. 1245-1246.) In June, the plaintiff appealed from the April judgment, but not from the February order striking the complaint. (*Id.* at p. 1246.) Under these facts, the *Maughan* court concluded it lacked jurisdiction to consider the plaintiff’s challenge to the order striking the complaint. (*Id.* at p. 1247.)

The same is true here. By not timely appealing the order granting Cooledge’s anti-SLAPP motion, Contreras forfeited appellate review of — and we lack jurisdiction to consider — any issues pertaining to the grant of Cooledge’s motion. Accordingly, we dismiss Contreras’s appeal without reaching the merits.

III.

DISPOSITION

Cooledge's motion to dismiss the appeal is granted. He shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) and (2).)

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.